

(1952) 02 CAL CK 0015
In the Calcutta High Court
Case No : A.F.A.D. No. 660 of 1948

Bishnupada Mondal and Another

APPELLANT

Vs

Dwijabhar Mondal and Another

RESPONDENT

Date of Decision : 26-02-1952

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F(7)

Citation : AIR 1953 Cal 241

Hon'ble Judges : P.N. Mookerjee, J

Bench : Single Bench

Advocate : Shyama Charan Mitra and Manan Kr. Ghose, for the Appellant; S.C. Janah and Shyamadas Bhattacharyya, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.

1. This is the plaintiffs' appeal arising out of a suit for confirmation of possession and permanent injunction on declaration and establishment of their tenancy right in the suit land. The suit has been dismissed by the two Courts below and in this appeal the plaintiffs as appellants contend that the said dismissal is erroneous as, according to them, on a proper construction of the two documents, namely, the Kobala (Ex. 1) and the Kabuliyat (Ex. 2) it ought to be held that the said Kobala and Kaouliyat were parts of one transaction so that what was sold by the Kobala (Ex. 1) was only the superior or (or?) the landlord's interest in the suit land under the Kabuliyat (Ex. 2) and the principal defendant No. 1 Respondent got in his pre-emption case nothing more of the suit land than the said superior or the landlord's interest. This contention of the plaintiffs-appellants which has been rejected by both the learned Munsif and the learned Additional District Judge will have to be carefully examined in this appeal in the light of the submission made by their learned Advocate.

2. The suit land forming a part of the land comprises an area of .10-1/3 decimals

out of .31 decimals appertaining to the occupancy rayati holdings recorded in C.S. Dags Nos. 134, 139 & 141 of Khatian No. 10 of Mouza Chotto Monoharpur, District 24-Parganas, and is mainly homestead. On 4-9-1943 it was apparently sold by the plaintiffs to pro forma defendant No. 2 along with some other lands, admittedly patit--the whole measuring .16 decimals--for a consideration of Rs. 500/- (Vide Kobala Ex. 1) and on the same day the Plaintiffs executed the Kabuliyat (Ex. 2) in favour of pro forma defendant No. 2 in respect of the suit land purporting to take a bemeadi lease of the same from the said pro forma defendant No. 2 as their landlord- The principal defendant No. 1 as a co-sharer of the occupancy raiyati holdings of which the suit land formed a part applied for pre-emption in respect of the sale made under the Kobala (Ex. 1) and succeeded in getting an order in his favour u/s 26F(5), Bengal Tenancy Act, against the vendee pro forma defendant No. 2 and, on the strength of that order, he attempted to disturb the plaintiffs' possession under the Kabuliyat (Ex. 2). Hence the present suit by the plaintiffs for declaration of their tenancy right in the suit land and for confirmation of their possession therein and also for a permanent injunction restraining the principal defendant No. 1 for (from?) disturbing such possession.

3. The suit was resisted by the principal defendant No. 1 mainly on the ground that the alleged lease under the Kabuliyat (Ex. 2) constituted in law a subsequent incumbrance--or, to use the words of the relevant statute, namely, the Bengal Tenancy Act, an incumbrance "created after the date of the transfer" -- within the meaning of Section 26F (7) of the Bengal Tenancy Act and could not, therefore, affect or prevail over the pre-emption of the sale under the Kobala (Ex. 1) which conferred full and absolute title to the pre-emptor principal defendant No. 1 over the suit land and entitled him to khas possession of the same. The Courts below have accepted this defence and dismissed the plaintiffs' suit and against this concurrent decree of dismissal the present second appeal has been preferred by the plaintiffs.

4. On behalf of the plaintiffs-appellants Mr. Mitter has argued that the Kobala (Ex. 1) and the Kabuliyat (Ex. 2) formed parts of one transaction so that the effective sale, so far as "the suit land was concerned, was not of the plaintiffs' entire interest therein but only of such interest minus the leasehold rights reserved in their favour by the Kabuliyat (Ex. 2), or, in other words, only the superior or the landlord's interest under the said Kabuliyat (Ex. 2) was actually sold by the Kobala (Ex. 1). In support of this argument, Mr. Mitter has strongly relied on the decision of the Judicial Committee in the case of -- Panaganti Rama-Rayanimgar vs. Maharaja of Venkatagiri as also on the decision of this Court in the case of -- "Mahmed Yakub v. Hamid Ali" 55 Cal 104. In my opinion, however, none of the said two decisions is of any assistance to Mr. Mitter's clients and neither of them is any authority for holding in favour of his contention,

5. In each of the two cases cited there was a mortgage under which the mortgagee was entitled to interest and in lieu thereof to possess and enjoy the

mortgaged properties. This right to possess and enjoy the mortgaged properties in lieu of interest was transferred --partly in one case and wholly in the other -- by the mortgagee in favour of the mortgagor by a lease executed on the same day as the corresponding mortgage and, in these circumstances, their Lordships held in either case that the lease was

"in the nature of machinery for the purpose of -- realising the interest due on the mortgage",

or, in other words, that it was a convenient means or arrangement for working out a part of the corresponding mortgage transaction so that the mortgage and the lease in each case were parts of one transaction.

In the present case, no such argument is available as the lease in question (vide *Kabuliyat Ex. 2*) can hardly be regarded as a machinery or a means or arrangement to work out the sale effected by the *Kobala (Ex. 1)* which was a sale apparently of all the properties mentioned in the schedule of that *Kobala (Ex. 1)* including the whole of the plaintiffs' interest in the suit property. When this is considered along with the recital in the *Kabuliyat (Ex. 2)* that the lessees thereunder, namely, the plaintiffs, were taking settlement of land which had already been sold to and purchased by the lessor the pro forma defendant No. 2 there remains little scope for thinking in the circumstances of this case, that the *Kobala (Ex. 1)* and the *Kabuliyat (Ex. 2)* formed parts of one transaction. It is important to note in this connection that there is nothing in the records of this case to indicate--and there is no suggestion even that but for the *Kabuliyat (Ex. 2)* the price fixed in the *Kobala (Ex. 1)* would have been higher, or, to put it more plainly, that such price would have been more than Rs. 500/-, the figure named in the *Kobala (Ex. 1)*, if the plaintiffs' whole interest in the suit land had been within the subject-matter of the sale in question. In such context it is impossible to hold, that the *Kobala (Ex. 1)* and the *Kabuliyat (Ex. 2)* were parts of one transaction and should be read together to ascertain the true nature thereof and should be so construed as to lead to the conclusion that what was sold by the plaintiffs to pro forma defendant No. 2 was not their full or entire interest in the suits land but only that interest minus the leasehold rights under the *Kabuliyat (Ex. 2)* or in other words, that only the superior or the landlord's interest vis a vis the said leasehold rights was sold by the *Kobala (Ex. 1)*. It follows, therefore, that Mr. Mitter's argument cannot be accepted and the present appeal must fail.

I, accordingly, dismiss this appeal but, in the circumstances of this case, direct that the parties would bear their own costs throughout.